

Vocaj (Migration) [2023] AATA 1822 (8 June 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Mikel Vocaj
VISA APPLICANT:	Ms Sidorela Zhuri
REPRESENTATIVE:	Mr Simon Leske
CASE NUMBER:	1837957
HOME AFFAIRS REFERENCE(S):	BCC2018/1351161
MEMBER:	David Crawshay
DATE OF ORAL DECISION:	8 June 2023
DATE OF WRITTEN STATEMENT:	9 June 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.211, cl.300.214, cl.300.215 and cl.300.216 of Schedule 2 to the Regulations; and • cl.300.221 of Schedule 2 to the Regulations.

Statement made on 09 June 2023 at 8:51am

CATCHWORDS

MIGRATION – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – genuinely intend to marry – genuinely intend to live together as spouses – Notice of Intended Marriage – money transfers and superannuation nomination – joint travel – extended joint residence periods – regular communication – family social media recognition – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 300.211, 300.214-300.216, 300.221; r 1.15

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The visa applicant applied for the visa on 22 March 2018. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on 5 December 2018 on the basis that the visa applicant did not satisfy cl.300.215 or cl.300.216 of Schedule 2 to the Regulations. Clause 300.215 requires that the parties genuinely intend to marry and that the marriage is intended by them to take place within the visa period. Clause 300.216 requires that the parties genuinely intend to live together as spouses. Both are time-of-application criteria.
4. The review applicant appeared before the Tribunal on 8 June 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant and from Ms Vera Zhuri, the mother of the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Albanian and English languages. The review applicant was represented in relation to the review. The representative attended the hearing.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issues in the present case is whether the parties genuinely intend to marry and to live together as spouses.
7. Clause 300.221 requires that, at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, cl.300.214, cl.300.215 and cl.300.216. Those criteria require that, at the time the visa application was made, the visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; the parties have met and are known to each other personally; the parties genuinely intend to marry and intend to do so during the visa period; and the parties genuinely intend to live together as spouses. Accordingly, in order to determine whether the visa applicant continues to meet those requirements, it is first necessary to consider whether they were met at the time of the visa application.

Does the visa applicant intend to marry an eligible person?

8. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. At all material times, including at the time of application and at the time of this decision, the review applicant has been an Australian permanent resident. Accordingly, the requirements of cl.300.211 are met and continue to be met.

Have the applicants met in person and are they known to each other personally?

9. Clause 300.214 requires that the parties have met in person since each of them turned 18 and that they are known to each other personally. The Tribunal has considered documents on the Department and Tribunal files such as Department movement records and photographs of the parties and is satisfied based on these documents that the parties had met in person since they turned 18 and were known to each other personally at the time of application. Therefore, at the time of application, the requirements of cl.300.214 are met.

Do the parties genuinely intend to marry?

10. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The Tribunal has sighted a fully signed and completed Notice of Intended Marriage (NOIM) dated 27 February 2018, stating that the marriage was intended to take place at St Bede's Church on 8 December 2018. It has also seen a letter from Rev Werner Utri affirming that the ceremony was booked to take place on 8 December 2018. The Tribunal accepts that these documents are genuine.
11. Based on this evidence, the Tribunal finds that the parties had a genuine intention to marry at the time of application in March 2018, and they satisfy the requirements of cl.300.215(a). Moreover, the proposed date for the marriage was within the visa period adjusted to take into account reasonable processing times, as required by cl.300.215(b). Therefore, the requirements of cl.300.215 are met.
12. More recently, the review applicant submitted a letter from Fr Wayne Edwards of the St Pius X Catholic Church dated 26 May 2023. Within this letter, Fr Edwards stated that the parties had booked their wedding to take place at the church on 14 October 2023. Both parties confirmed this at hearing.
13. Based on the letter from Fr Edwards and on the parties' consistent testimony regarding the details of the proposed wedding, the Tribunal accepts that the parties continue to have a genuine intention to marry and intend for this marriage to take place within the visa period, being nine months from the grant of the visa. Clause 300.215 continues to be met for the purposes of cl.300.221.

Do the parties genuinely intend to live together?

14. Clause 300.216 requires that at the time of application "the parties genuinely intend to live together as spouses". "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
15. Since the date of the delegate's decision in December 2018, the parties have submitted significant new information, including:
 - submissions from the review applicant's representative;

- receipts of international money transfers from October 2017;
- a will signed by the review applicant and dated 22 May 2020;
- a superannuation nomination dated 20 May 2020;
- records of communication (calls and messages) for the period from 2017 till recently;
- photographs of the parties with each other and with family members and some friends;
- selected posts and other evidence from social media;
- evidence of travel, such as hotel invoices;
- statements and declarations from the parties;
- statements and declarations from third parties such as family members and friends;
- a relationship certificate dated 27 May 2019; and
- a letter from a priest at St Pius X Catholic Church relating to a wedding booking, dated 26 May 2023.

16. The Tribunal has considered this new information alongside existing information on the Department file, Department movement records and the testimony of the parties and their witness at hearing. It will provide some of this information to the Department upon remittal.
17. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.
18. Beginning with the financial aspects of the parties' relationship, the Tribunal finds that they have combined their financial affairs to a limited extent. Although there is no evidence to show that the parties had any joint assets or debts at the time of application and at the time of this decision, it accepts that the review applicant has made a will in favour of the visa applicant dated 22 May 2020 and that he made a binding superannuation death nomination in her favour although it is noted that this nomination expired on 7 May 2023. This evidence is given weight towards the time-of-decision criteria.
19. The Tribunal accepts based on international money transfer receipts that the review applicant had begun making money transfers to the visa applicant in October 2017 and has continued to do so. At hearing, it asked the visa applicant what she used the money for, and she replied that it was for daily essentials and clothes. This evidence is given weight towards the time-of-application and time-of-decision criteria.
20. The Tribunal has considered evidence of the financial aspects of the parties' relationship and finds that the level of financial integration is appropriate to the parties' circumstances. This aspect is given weight towards the parties having a genuine intention to live together as spouses at the time of application and at the time of decision.
21. Turning to the nature of the parties' household, the Tribunal has considered evidence in the form of photographs of the parties, movement records and other evidence showing travel to

and from and within the Eastern Mediterranean. It notes that the parties had spent limited time in each other's company before their decision to get engaged in August 2017 and limited time from that point until the visa application was lodged in March 2018. This is acknowledged by the parties' representative in a submissions letter of 22 March 2018 where it was admitted that *"the duration for which they have lived together is not significant"*.

22. At hearing, the Tribunal asked the parties how they were able to develop their relationship to a point where, at the time of their engagement, they were in a committed relationship given that they had only seen each other for three days in-person at that point. It notes that this had been a specific concern for the delegate in his decision. The review applicant told the Tribunal that he had feelings for the visa applicant and she for him. He said that the parties had been calling each other for four-or-five hours-a-day before they met each other in person. The visa applicant spoke in similar terms, telling it that she did not consider the period to be short as they had been talking on the telephone for a year.
23. Most recently, the Tribunal notes that the review applicant was outside of Australia for a period of over two years from 7 October 2020 to 31 October 2022. It asked him about his specific movements during this time and he said that he moved between Montenegro and Northern Italy during this time, alternating between staying with the visa applicant at her cousin's house in Podgorica and with his cousin in Padua, although it must be said that he was vague regarding the dates of when he stayed at these two locations. He told it that the visa applicant would live with him all the time when they were in Podgorica and would live with him for three months when he was in Padua and then return to Albania afterwards.
24. The Tribunal then sought to corroborate these claims with the visa applicant, who unlike the review applicant was able to particularise the parties' movements during the full two-year period that the review applicant was overseas. She told it that the parties lived together for a total of around 14 months out of the two years the review applicant was in Europe. When questioned about why they did not live together for more periods during that time, she said that the review applicant needed to work. Earlier in the hearing, the review applicant told the Tribunal that he had been working for his uncle in Padua as a roof tiler. Given that the review applicant was away from his employment in Australia for this time, the Tribunal finds this to be a plausible explanation.
25. In circumstances where parties are unable to live together in the one place continuously, the Tribunal considers that evidence about their communications during time when they are not physically together may be important in ascertaining if they are sustaining a common household. In this regard, it notes that there is evidence to show that the parties first met each other on Facebook in August 2016 and were well acquainted enough to share selfies of each other as early as January 2017. They had previously submitted message logs from WhatsApp for periods in December 2017 and February 2018 that showed extensive communications during those periods as well as WhatsApp call records for September and October 2017 and February 2018, although these records do not show the duration of the calls.
26. This evidence of communication is supplemented by more recent evidence such as call records showing regular calls between the parties during the periods leading up to the review applicant's departure from Australia in October 2020 and after his return in October 2022. Many if not most of these calls lasted for more-than-an-hour.
27. The Tribunal has considered the evidence of the nature of the parties' household. It finds that they spent very limited time together prior to their engagement in August 2017 and prior to the visa application being lodged in March 2018. However, it also finds that the parties had been communicating with each other by this point, most likely regularly. Therefore, while the Tribunal has some concerns about the rapid development of the parties' relationship, it

accepts that it is partly able to be explained by them having already engaged in a significant online relationship. This aspect is given some weight.

28. Moreover, the Tribunal accepts that the parties have lived with each other for extended periods since October 2020 in Montenegro and Northern Italy. In coming to this finding, it has relied upon Department movement records showing that the review applicant travelled out of Australia in October 2020 and back in October 2022, as well as photographs of the parties in Podgorica and Padua and during holidays to Barcelona and the Amalfi Coast in Italy. Given the sheer length of this period of joint residence, and the fact that the review applicant undertook the travel in the teeth of very stringent border restrictions, it accords this evidence substantial weight.
29. The Tribunal finds that the evidence of the nature of the parties' household points to them having a genuine intention to live together as spouses at all material times.
30. Dealing with the social aspects of the relationship, the Tribunal has had regard to statements and declarations from members of the parties' families and friends of the review applicant from at both the Department and Tribunal stages as well as to photographs showing them being welcomed by members of each other's families. It has also considered several posts on the social media platform Instagram from the time of their engagement in August 2017 as well as during a holiday in Italy in 2019 and more recently in Montenegro. It notes that each of these posts has attracted over 100 "likes".
31. At hearing, the Tribunal heard from the visa applicant's mother who told it that she first learnt about the parties' relationship in August 2016. She said that the review applicant was introduced to her and her husband and they liked him. She said that the parties had an engagement party in Tuzi, Montenegro, and that they met him in person then. When asked why she considered the parties' relationship to be genuine, the visa applicant's mother said that they had been together for seven years. She said that her family knows him and likes him very much. She said that she talks to him often. She said that the parties' families get along well with each other.
32. The Tribunal has also considered a large number of photographs of the parties with each other and with third parties. At hearing, the review applicant was able to identify when these photographs were taken and the third parties who were depicted in these photographs without any prompting or hesitation.
33. Based on the information in front of it, the Tribunal accepts that the parties have represented themselves to other people as being engaged to each other, whether this is members of their families or their contacts on social media platforms such as Instagram. It accepts that the parties are recognised as being in a genuine and continuing relationship. In coming to this finding, it accepts the contents of the declarations and statements given by third parties and has had particular regard to the testimony of the visa applicant's mother at hearing.
34. The Tribunal finds that the social aspects of the parties' relationship indicates that they have a genuine intention to live together as spouses at the time of application and at the time of this decision.
35. The Tribunal turns lastly to the nature of the parties' commitment to each other. It accepts based on their consistent testimony that they met on Facebook in August 2016 and that their relationship developed soon after through communications. It accepts that they became engaged in August 2017. Even though the parties had spent very little time together at the time of application in March 2018, the Tribunal accepts that their relationship was a committed one by that stage.

36. In terms of the degree of companionship and emotional support that the parties draw from each other, the Tribunal relies largely on the evidence already dealt with above showing that the review applicant travelled to Europe to live with the visa applicant as well as the parties' extensive communication during periods when they were not physically together. Furthermore, when the parties were questioned at hearing about various aspects of each other's personal lives and their interests and hobbies, both displayed an intimate and detailed knowledge.
37. The totality of this evidence leads the Tribunal to accept that the parties draw a significant degree of companionship and emotional support from each other and that they view their relationship as a long-term one. These aspects are accorded substantial weight.
38. The Tribunal finds that the nature of the parties' commitment points to them having an intention to live together as spouses at the time of application and at the time of this decision.
39. Having taken into account the matters set out in r.1.15(3) in relation to the definition of spouse under s.5F(2), and based on the above evidence and findings, the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses and that they continue to do so at the time of this decision. Therefore cl.300.216 is met in itself and continues to be met for the purposes of cl.300.221.

Do the parties continue to meet time of application requirements?

40. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, the visa applicant intends to marry an eligible person; the parties have met and are known to each other personally; the parties genuinely intend to marry and intend to do so during the visa period; and the parties genuinely intend to live together as spouses.
41. The Tribunal has above made findings that cl.300.215 and cl.300.216 are met for the purposes of cl.300.221. Additionally, the review applicant continues to be an eligible person under cl.300.211 and the finding in relation to cl.300.214 about whether the parties have met each other in person since turning 18 and are known to each other remains.
42. Accordingly, these time-of-application criteria all continue to be satisfied at the time of decision, and cl.300.221 is met.
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

44. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.211, cl.300.214, cl.300.215 and cl.300.216 of Schedule 2 to the Regulations; and
 - cl.300.221 of Schedule 2 to the Regulations.

David Crawshay
Member